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MOTION FILED JAN 28 1954

Supreme Court of the United States

OCTOBER TERM, 1953

No. 497

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*

SG refused permission.

ROYAL W. FRANCE,
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IN THE

Supreme Court of the United States

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MORTON SOBELL,
Petitioner,
vs.
UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the signers, who have authorized the inclusion of their names in an *Amicus Brief*, by signing a petition (Exhibit A hereto annexed), respectfully moves this Honorable Court for permission to file the accompanying brief, as *amici curiae*. The attorney for the petitioner has consented to the filing of this brief. Permission for leave to file has been requested from the Solicitor General but such permission has been refused.

WHEREFORE, it is respectfully requested that this Honorable Court grant this motion for leave to file the annexed brief *amici curiae*.

ROYAL W. FRANCE,
Attorney for Amici Curiae,
104 E. 40th St.,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

MORTON SOBELL,
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BRIEF AS FRIENDS OF THE COURT

It is with the deepest concern that the undersigned have considered that if Morton Sobell had been tried by himself instead of as a co-conspirator of Julius and Ethel Rosenberg, he could scarcely have been convicted on the scanty and circumstantial evidence presented against him.

Being joined, as his case was, with that of the Rosenbergs in the super-heated atmosphere that a trial for giving atomic secrets to the Soviet Union engendered, made difficult the jury's task of separating the evidence against him from that for which they convicted the Rosenbergs. Hence, if the newly discovered evidence presented on the Rosenbergs' motion for a new trial might have caused a different determination in Sobell's case, a new trial for Sobell should have been ordered. The prolonged deliberation of the jury with regard to Sobell and the dissent of Judge Frank in his case reveals on what a thin thread his conviction hung.

The sentence of thirty years in Alcaltraz could scarcely have resulted had not the trial judge tied him into the conspiracy to transmit atomic secrets, although there was

no proof that Sobell knew that the Rosenbergs had the alleged dealings with an agent of a foreign power, nor that he transmitted or agreed to transmit any information, atomic or otherwise, to a foreign power.

This Court in *Griffin* v. *United States,* 336 U. S. 704, has indicated that newly discovered evidence which might have affected the jury's verdict, should not be rejected on the basis of mere speculation that the jury might not have attached significance to it sufficiently favorable to defendant to have brought about a different verdict.

Here, as shown in the brief filed by Sobell's attorneys, evidence was presented to the jury which may well have played a part in their decision, which is now brought into serious question as to its truthfulness and doubt is thrown on the veracity of David Greenglass. It is beyond question that if the jury had disbelieved the story of Greenglass a verdict of guilty could not have been reached. The Court below should not have speculated in a capital case of this sort on what effect the newly discovered evidence would have had on the jury nor brushed it aside as without significance.

This Court, in view of its burdens, must, of course, draw the line as to where and when it will consider evidentiary matters. Here, however, in the light of the extraordinary circumstances of the *Sobell* case, there are grave possibilities that there may have been a miscarriage of justice by reason of the passions aroused by the belief that atomic secrets had been given to the Soviet Union and that this belief, rather than anything proved with regard to Sobell determined the verdict. Relations with Russia had radically altered since the alleged events took place and the whole trial was vitiated by loosely supported charges linking the defendants with communism and communism generally with disloyalty. What emotions may or may not have been aroused, for example, in the jurors by evidence about a table given to the Rosenbergs by the Soviet Union which

was especially constructed for espionage work, is hard to estimate. In *Wigmore on Evidence,* Sec. 389, the author says truly:

> "The general inquiry is *what circumstances tend probably to excite a given emotion?*
>
> Obviously, the whole range of human affairs is here involved. It would be idle to attempt to catalogue the various facts of human life with reference to their potency in exciting a given emotion. Such an attempt would exhibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules and that a given fact can have an invariable quantity of emotional potency. It would be useless, because the emotional effect *of any fact* must depend so often *on the surrounding circumstances* that no general formula could provide for the infinite combination of circumstances. Courts have always, therefore, been agreed that no fixed negative rules can be made, that no circumstance can be said to be without power to excite a given emotion." (Emphasis supplied.)

In this period there is always the danger mentioned by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee et al.* v. *McGrath,* 341 U. S. at 175:

> "In days of great tension when feelings run high it is a temptation to take a short-cut by borrowing from the totalitarian tactics of our opponents, but when we do so we set in motion a subversive motion of our own design to destroy us from within."

In the current situation of the "cold war" conditions prevailed at the trial of this case which put it into a different focus than that which existed when the conspiracy is alleged to have taken place. It seems to us, therefore, that the belief by the jury that a specially constructed console table had been given to the Rosenbergs by the Russians, might well, in such an atmosphere, have tipped the scales against the defendant, who by the nature of the trial had their deeds imputed to him, just as knowledge by the

jury of the uranium theft by Greenglass or his wife's characterization of him as a person whose word could not be relied upon or the prior inconsistent statements made by Greenglass or the evidence suggesting that Greenglass received special consideration for himself and immunity for his wife as the price of testifying might have tipped the scales in his favor.

This case, presenting as it does, the danger of the merging of different conspiracies, is one in which we believe that the Court below should have been liberal in its attitude toward newly discovered evidence as a basis for a new trial. The claimed conspiracy of securing information on atomic energy for the Soviet Union was so serious that bringing it into Sobell's case may well have obliterated from the minds of the jurors the presumptions and safeguards to which he was entitled.

We urge this Honorable Court to grant certiorari to permit these questions to be considered.

Respectfully submitted,

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Attorney for Amici Curiae,
104 E. 40th St.,
New York, N. Y.

EXHIBIT A

THE ARREST, indictment, and trial of Morton Sobell upon the charge of conspiracy to commit espionage and the resulting sentence of thirty years in Alcatraz in an atmosphere of hysteria induced by transient political and social passions, lacked guarantees of fairness which all Americans have a right to expect under the Constitution.

MORTON SOBELL is requesting the Supreme Court to review his case on the basis of new evidence connected with his joint trial with Ethel and Julius Rosenberg. This new evidence, never presented to the Supreme Court for the Rosenbergs, very seriously challenges the credibility of the major prosecution witnesses.

WE BELIEVE that the standards of American justice require a new trial for Morton Sobell in an atmosphere free of hysteria.

IN THE LIGHT of the extraordinary circumstances, which from the very beginning have surrounded the Rosenberg-Sobell case, we authorize the inclusion of our names in an Amicus Brief to the Supreme Court of the United States, petitioning that the verdict be set aside, and that a new trial for Morton Sobell be ordered based on constitutional guarantees of fairness and equality under the law, in accordance with the best traditions of American justice.

Name	*Profession*	*Address*
Dr. Harold C. Urey	Scientist	Chicago, Ill.
Dr. Mary Church Terrell	Educator	Washington, D. C.
Dr. Bernard M. Loomer	Theologian	Chicago, Ill.
Prof. Ephraim Cross	Educator	New York, N. Y.
Professor Linus Pauling	Scientist	Pasadena, Calif.
Philip Morrison	Physicist	Ithaca, N. Y.
Professor George Sarton	Historian of Science	Cambridge, Mass.
Alvena Seckar	Artist-Writer	Pompton Lakes, N. J.
Harry F. Ward	Educator	Palisades, N. J.
Dr. Leo Mayer	Orthopedist	New York City
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EXHIBIT A (Continued)

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Dr. W. A. Hunton	Educator	New York City
Annette T. Rubinstein	Educator	New York City
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Vincent Castiglione	Trade Union Organizer	Newark, N. J.
Dr. Dorothy Brewster	Educator	New York City
Dr. Murray Abowitz	Medical Doctor	Los Angeles, Calif.
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James M. Evans	Justice of the Peace	Arab, Ala.
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Dr. William Wells Denton	Educator	Tucson, Ariz.
Albert Maltz	Writer	Mexico, D. F.
Professor Serge Chermayeff	Graduate School of Design, Harvard Univer.	Cambridge, Mass.
Professor Frankie G. Merson	Educator	Keuka Park, N. Y.
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David Newman	Accountant	New York City
Dr. Eleanor Yachnes	Physician	Brooklyn, N. Y.
Giles C. Evans	Trade Union Official	Sedro-Woolley, Wash.
Anthoney & Edna Toney	Painter & Writer	New York City
Dr. Frank C. & Opal F. Kracek	Medical Doctor & Wife	Chevy Chase, Md.
Dr. Irving E. Putnam	Clergyman	Minneapolis, Minn.
Dr. H. David Hammond	Botanist	Philadelphia, Pa.
Henry Schmidt	Trade Union Official	San Francisco, Calif.
Philip Eden	Economist	San Francisco, Calif.
Eugene Eagle	Optometrist	San Francisco, Calif.
Rev. John M. Miles	Clergyman	Detroit, Mich.
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EXHIBIT A (Continued)

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Rabbi S. Burr Yampul	Clergyman	Chicago, Ill.
Rev. C. B. Heaek	Clergyman	Detroit, Mich.
Dr. David Telson	Physician	Brooklyn, N. Y.
Mitchell Schnaar	Attorney	Detroit, Mich.
Dr. Hyman J. Hirshfield	Physician	Chicago, Ill.
Harold Morris	Attorney	Detroit, Mich.
Bernard Probe	Attorney	Detroit, Mich.
Don W. Harlan	Attorney	Detroit, Mich.
Dr. W. E. B. DuBois	Historian	Brooklyn, N. Y.
Dr. H. E. Armus	Physician	Detroit, Mich.
Dr. Emery W. Balduf	Educator	Chicago, Ill.
Charles Hartshorne	Educator	Chicago, Ill.
Dr. James McBurney	Educator	Chicago, Ill.
A. Eustace Haydon	Minister & Educator	Chicago, Ill.
Dr. Leonard Pockman	Physicist	San Francisco, Calif.
Bernard Davidson	Scientist	Brooklyn, N. Y.
Mrs. Clara Hanchett	Librarian	San Francisco, Calif.
Hassel W. Smith	Teacher	San Francisco, Calif.
Jessie F. Binford	Social Worker	Chicago, Ill.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 112, October Term 1952

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HAROLD M. PHILLIPS,
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Supreme Court of the United States

No. 112, October Term 1952

MORTON SOBELL,

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UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Morton Sobell respectfully moves this Court for leave to file a Second Petition for Rehearing with respect to the denial of certiorari herein.

This motion is addressed to, and limited to, a single question presented on the original petition for a writ of certiorari herein, namely, *whether* the trial court, in a conspiracy trial, may withdraw from the jury the question whether petitioner was proved to have entered into the principal conspiracy charged in the indictment when objection is seasonably raised that the proof has shown two separate conspiracies, if any.[1]

A supervening event of major significance occurred subsequent to the denial of certiorari as to this aspect of this petitioner's case: namely, the review by the Court (346 U. S. 273) of the stay of execution granted by Mr.

[1] This was the Question Presented as 1(b) in the Petition, No. 112, O.T. 1952 and discussed as 9(b) in the Solicitor General's Brief in Opposition.

Justice Douglas to petitioner's co-defendants.[2] The Court's examination of the substantiality of the question whether the Atomic Energy Act of 1946 had affected the sentencing power of the trial court had the incidental effect of newly illuminating this separate question on which Circuit Judge Frank had dissented from the affirmance of Sobell's conviction (R. 1666-7; 195 F. 2d at p. 601-2). The result is to furnish express substantiation of contentions made on behalf of petitioner when review was originally sought. These significant contentions are:

> (1) That the jury was improperly directed by the trial judge on the question of whether Sobell had joined an overall conspiracy embracing atomic secrets;
>
> (2) That secrets pertaining to atomic energy and atomic weapons are and were of such a qualitatively different character from other military information as to have required explicit direction by the trial judge that the jury should have found it to be the "fair import of the concerted purpose" of the conspiracy, as Sobell understood it, that it should include atomic espionage, as a condition precedent to petitioner's conviction under the indictment and on the record below.

It hardly requires to be said that the examination of the question now presented does not draw into consideration to any extent whatsoever the validity of the conviction, judgment or sentence on petitioner's co-defendants. It is well settled (e.g., *Canella* v. *United States,* 157 F. 2d 470) that the "central figure" may not complain if his conviction should be found to rest on two separate conspiracies rather than an all-inclusive whole.

Basic to the position of this petitioner is the fact acknowledged by the trial judge at the moment he was sentenced, "The evidence in the case did not point to any activity on your part in connection with the atom bomb project" (R.

---

[2] There has also been a further conflict of circuits since the original submission; see p. 4, infra.

1620). The evidence did not merely fail to show "activity"; it failed to show acquiescence, interest, knowledge, or even unconscious assistance in atomic espionage. Indeed the case against Sobell does not even purport to show testimony claimed to constitute direct evidence of membership in *any* conspiracy until a date later[3] than the completion of all of the alleged overt acts relating to the atomic espionage conspiracy—conclusion of which prior to 1946 has now been held to constitute the overriding factor which prevented consideration of the effect of the Atomic Energy Act on the sentencing power of the trial judge.

Power of the Court

The present motion, for leave to secure reconsideration at a time subsequent to the expiration of the time provided for by Rule of Court for rehearing, is unusual but by no means unprecedented. *Zap* v. *United States,* 330 U. S. 800; *Stone* v. *White,* 300 U. S. 643; *McGrath* v. *Manufacturers Trust Company,* 337 U. S. 953; see 28 U. S. C. 452. The circumstances of this case clearly warrant the exercise of the unusual, but undoubtedly existing, power of this Court to grant leave to file for rehearing at this stage in the proceedings.

Reasons for Granting Reconsideration

The particular question sought to be presented—and never reviewed by this Court at any stage of this case—is one of general importance in the administration of federal criminal justice, and as to which there has existed, since the decision below, a conflict of circuits warranting exercise of this Court's certiorari jurisdiction. The conflict as claimed at the time of submission of the original petition for the writ, as to the role of the jury where a

[3] Said to be the "early part of 1946" (R. 245).

defendant has raised a colorable claim of proof of more than one conspiracy, was stated then to be between the decision below, in the Second Circuit, and the decision of the Third Circuit in *Lefco* v. *United States*, 74 F. (2d) 66.

Further conflict in circuits: Subsequent to that original submission (which was June 7, 1952), the Ninth Circuit held, in *Carrigan* v. *United States*, 197 F. 2d 817 (cert. den. 344 U. S. 866[3a]), that it was for the *jury* to determine whether the prosecution had proved "the existence of a single overall plan in which all participated" (at p. 820). And shortly before the original submission, and unknown to counsel at the time, the Seventh Circuit in *United States* v. *Lutwak*, 195 F. 2d 748 (aff'd without consideration of the question 344 U. S. 604), held that it was appropriate for the *jury* to consider "the issue of common purpose and design" (at p. 751) and the sufficiency of the evidence of "interrelated coordinated conduct by the several parties" (at pp. 752-753).

The foregoing reasons are quite independent of the basic need that one who maintains his innocence, as does this petitioner, of any crime, and particularly a crime of such grave consequence, should be convicted only after a trial in which adequate safeguards exist against miscarriage of justice. The protection of such safeguards is of particular importance where, as here, the conspiracy device has been employed for the procedural advantage of the prosecutor. The jury which was called upon to determine petitioner's fate was overwhelmed with the awful fears constantly associated with every aspect of control of atomic energy information in a trial in which the transfer of the "secret" of the atomic bomb to a power considered hostile dominated the courtroom from the beginning to the end.

[3a] Sub nom. *Davidson* v. *United States*.

Argument

1. It may not be inconceivable that two or more conspirators should plot to transmit both non-atomic and atomic secrets as part of a single conspiracy. But the question insistently sounded by this record is whether Morton Sobell has been fairly convicted of having participated in *such* a conspiracy.

The original petition did not, as it now appears, adequately present to the Court the significant proposition demonstrating that an important choice of inferences necessarily must be made before one accused of having conspired with respect to non-atomic secrets can be found to have been willing to accept a "common purpose" embracing both atomic and non-atomic espionage.

The supervening circumstance of the court's review, in Special Term, of the stay based on the Atomic Energy Act focusses attention on the mass of data which refute the proposition blandly stated by the Government in opposition to Sobell's petition for a writ of certiorari:

> "There is not a 'different kind of a difference' (see Pet. 26) between data on the (atomic) bomb and the large, albeit random, collection of data about the United States Military effort that Sobell must have known was being undertaken" (No. 112, O.T. 1952, Br. Opp. 47).

This is precisely what the Attorney General's "Application to Convene Court in Special Term" of June 17, 1953, and the consequent opinions of this Court, as well as the legislative materials referred to therein, demonstrate to be wholly incorrect. The quality and character of atomic energy information was recognized, for example, as wholly different from all "information relating to the national defense" theretofore covered by the Espionage Act, in that the latter was to be determined to be "secret" by the armed services (e.g. *United States* v. *Heine*, 151 F. 2d 813),

whereas the former is to be classified by the civilian Atomic Energy Commission (Application to Convene Court in Special Term, p. 7, n). The problem of atomic energy control raised the question—never theretofore relevant to the subjects protected by the Espionage Act—of the need "to reconcile the requirement for security control of information with the necessity for sufficient freedom of interchange between scientists to assure the nation of continued scientific papers" (Application to Convene Court in Special Term, p. 8). The nature of the subject matter involved was such that "The Espionage Act as it was written would not do" (Sen. McMahon, 92 Cong. Rec. 6082, quoted at p. 9 of Application to Convene Court in Special Term).

At another point in the same debate Senator McMahon stated "atomic energy makes its own rules. It is sui generis" (92 Cong. Rec. 6082). Or, as stated by Newman & Miller, The Control of Atomic Energy, p. 226 (1948), "it was the clear intent of Congress, as evinced by the drastic penalties alone, to treat atomic energy as a *category special and unique*". (Emphasis supplied.)

This has been not only legislative policy, but the policy of the executive in international affairs pertaining to the subject matter:

> "The official United Nations' proposals for international control of atomic energy apparently involve the assumption that A-bombs are so unique technically and so menacing as to set them apart from conventional weapons and to justify separate consideration in the United Nations and a separate regulatory system." *Laurence, the Hell Bomb,* pp. 174-175 (1951).

It has never been questioned in any responsible quarter that there was overwhelming evidence before the Congress to justify the treatment of control of information relating to atomic energy as "a category special and unique". The legislative process itself was unique, a Senate Special Committee on Atomic Energy having been constituted pursuant to Sen. Res. 139 and having conducted numerous hearings

prior to the drafting on the bill S. 1717 that ultimately became fashioned into the Act. In Sen. Rep. 1211, 79th Cong., 2nd Sess., reporting S. 1717 as amended by the Committee after numerous further hearings, the following point was made part of a "terse summary of the main lines of the testimony" (S. Rep. 1211, p. 5):

> "(1) The atomic bomb is a weapon of appalling destructiveness. While quantitative comparisons with other explosives can be made, the arithmetical ratios describe inadequately the profound changes in all relations between nations foreshadowed by the existence of the atomic bomb."

The unique character of atomic energy secrets was inherent in the subject matter and was not produced but merely registered by the enactment of the Atomic Energy Act of 1946. Detailed consideration of the evidence on which the Senate Committee and the Congress were prompted to act seems hardly necessary. The differences between atomic energy information and other "information relating to the national defense" are repeatedly emphasized in the testimony of the witnesses before the Committee.[4]

The words of the counsel to the Senate Special Committee summarize aptly the outstanding fact of national thinking from 1945 forward with respect to the difference:

> "In the course of the Committee's schooling it no doubt received a good deal of information and admonition on the military applications of atomic energy. However, the point that that atomic bomb is terrifying beyond imagination did not need to be labored; it was recorded adequately in the wasted bodies, the twisted members, the ashes, and the debris of Nagasaki and Hiroshima. If the Committee members were less sensitive than John Hersey in registering all the impli-

[4] U. S. Senate, Special Committee on Atomic Energy, 79th Cong., Second Sess. Hearings pursuant to S. Res. 179, Hearings, Atomic Energy Act of 1946, passim.

cations of this record, they had to be no more imaginative than millions of their constituents to feel an apprehensive dread in their hearts.

The somber fear that the cities of the United States might be the Nagasakis and Hiroshimas of a future war brooded over their deliberations."

Newman & Miller, The Control of Atomic Energy, p. 52 (1948).

2. Absent from the record below is any evidence of any awareness of, aid to or interest in atomic espionage on the part of Morton Sobell. The Government's position in this Court has been that the Rosenbergs participated in "a single conspiracy to transmit secret information, without restriction as to type, to the Soviet Union" (Br. opp. p. 45, No. 112, O.T. 1952) and that it *could have been inferred* that Sobell "understood and shared this objective" from testimony claimed to show that he supplied some unidentified information, sought to obtain some on ordnance fire control, sought to persuade a fellow technician in ordnance fire control to remain with the Navy Department, and asked this technician in ordnance fire control for the names of others who might be of similar bent (Br. opp. p. 46).

The character of the difference between such matters and atomic energy information is such that it *could have been inferred instead* that the intent evidenced by such testimony did not extend to a "common purpose" including both atomic and non-atomic espionage.[5] However, the jury was not directed in explicit, unequivocal terms that an intent of a character evil enough to base a finding of willingness to transmit atomic secrets was required to be inferred to justify a finding that Sobell was a member of the principal conspiracy charged. Instead they were told, as shown in Judge Frank's analysis of the charge (R. 1664-1667; 195

[5] Petitioner also argued, and still maintains, that, as a matter of law, no other inference was possible (Pet., pp. 19-29).

F. 2d at pp. 600-602), that if they "believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment." [6]

With characteristic understatement, the Columbia Law Review remarked with respect to this issue:

> "* * * it does not seem that the evidence was so conclusive as to warrant withdrawal of the issue of multiple conspiracies from the province of the jury * * *. Judge Frank argued, however, that inasmuch as the evidence might equally have supported an inference of two conspiracies, Judge Kaufman's failure to instruct the jury clearly on this possibility constituted reversible error."
>
> Note, *The Rosenberg Case* (1954), 54 Col. Law Rev. 219, 232.

To support the conclusion of the trial judge, and the majority of the Court of Appeals, that the Government's case against Sobell warranted an instruction such as that given below it is necessary to reject every fact of national life, every finding prompting congressional action, with respect to the difference between atomic and non-atomic information. The nub of the point was stated by the prosecutor himself in resisting the motion of the Rosenbergs' counsel for reduction of their sentence when he stated: "Ordinary espionage is one thing. Atomic espionage is another" (cited at No. 719, O.T. 1952, R. 343).

3. In opposition to Sobell's petition for a writ of certiorari of June 7, 1952, of which reconsideration is now sought, the Government had taken the position with respect to the question then and now presented, that the court had

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[6] Compare comment of Mr. Justice Frankfurter, who was not, however considering petitioner's point in making the following observation:

> "Only one conspiracy could have been found by the jury to have existed, and that was the conspiracy averred in the indictment, a conspiracy continuous from a date certain in 1944 to a date certain in 1950" (346 U. S. at p. 304).

in fact so charged the jury as to permit it to be said that their verdict showed "that a comprehensive conspiracy existed" and that "Sobell was a part of it" (No. 112, O.T. 1952, Br. opp. p. 49). The representation thus made was that the jury's role had been respected by the trial judge and hence no conflict of circuits existed.

That the question was withdrawn from the jury and that Judge Kaufman's action in doing so is believed to have been approved by the denial of certiorari herein, was subsequently demonstrated by the comment of the learned trial judge on the proceedings on the motion for the reduction of this petitioner's sentence:

> "Mr. Kilsheimer (Ass't U. S. Att'y): Judge Frank's dissent was predicated purely on a legal ground concerning the charge which he thought should have been given to the jury——
>
> The Court: His dissent was purely on the ground, as I recall it, as to whether or not I should have submitted to the jury the question whether there were two conspiracies instead of one, instead of ruling on them as a matter of law.
>
> Mr. Kilsheimer: And the majority found there was sufficient in your Honor's——
>
> The Court: *And I have always understood that to be the law for many years—that there was a question of law for the judge to decide.*" (Emphasis supplied.)
>
> United States District Court, S. D. N. Y., January 8, 1953, S. M. 17.

Responsible scholarly opinion has now reviewed the proceedings in these cases. And with respect to this aspect of the character of the charge to the jury it is stated in Note (1954) *The Rosenberg Case,* 54 Col. Law Rev. 219, 228:

> "* * * the jury was directed in effect that if they found that Sobell had committed acts within the terms of the indictment it was their duty to find him a co-conspirator with the Rosenbergs, Greenglass and Gold, and that in no event was it their function to distinguish between atomic and non-atomic espionage. Thus the

issue of multiple conspiracies, that is, a Rosenberg-Sobell conspiracy distinct from a Rosenberg-Greenglass-Gold conspiracy, *was never submitted to the jury.*" (Emphasis supplied.)

A jury properly instructed would have been free to make the judgment—the factual judgment—as to the scope of the agreement into which petitioner had entered.[7] The "dragnet" of conspiracy prosecution may be employed to impose vicarious responsibility for unknown co-conspirators and unknown crimes only within the "scope of the agreement actually made"—this is so because a party may only be held to have "taken his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them." *United States* v. *Andolschek,* 142 F. (2) 503, 507 (per Learned Hand, J.).

"The somber fear that the cities of the United States might be the Nagasakis and Hiroshimas of a future war" (cited supra, p. 8, from Newman & Miller, op. cit.) brooded over the deliberations of the jury in this case, casting a blacker shadow indeed, than over the deliberations of Congress four years before, prior to the revelation of Soviet mastery of the atomic bomb. Its prejudicial effect was so manifest that the Government has not claimed in any court, at any stage, that if "separate conspiracies" were involved the joint trial constituted "harmless" error (cf. *Berger* v. *United States,* 295 U. S. 78). But the jury

[7] Compare the instructions quoted with approval in *Carrigan* v. *United States,* 197 F. (2) 817:

"An indictment charging a specified crime cannot be supported by proof of a different crime. If you find that two or more of the defendants entered into some conspiracy somewhere at some time, but that they did not enter into the conspiracy charged in the indictment, then you must acquit them of the conspiracy charged in the indictment."

197 F. (2) at p. 821, note.

was never allowed to consider whether Morton Sobell would have agreed to join a plot which might result in making a Hiroshima of the city where he lived with his wife and children, had he contemplated the possibility.

Conclusion

WHEREFORE, it is respectfully prayed that leave be granted this petitioner, by reason of supervening circumstances, to file petition for rehearing herein, and that the order of the Court of October 13, 1952, denying certiorari, be vacated, that certiorari be granted to review the decision of the Court of Appeals for the Second Circuit, and on such review the judgment be reversed and a new trial ordered.

Respectfully submitted,

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